

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of
Petition for Waiver Filed by

Accipiter Communications, Inc.

Concerning the Definition of “Study Area” Contained in the Part 36 Appendix-Glossary of the Commission’s Rules

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 96-45

AAD 96-35

To: Chief, Common Carrier Bureau

REQUEST FOR REMOVAL OF WAIVER CONDITION CONSISTENT WITH COMMISSION POLICY

Accipiter Communications, Inc. (“Accipiter”) submits this request for the removal of the “cap” on the Universal Service Fund (“USF”) cost allocation support payments established by the Commission’s Order adopted November 14, 1996, with respect to Accipiter’s study area.¹ The Order authorized the transfer of local exchange facilities consisting of 30 access lines into a new study area for Accipiter. As a condition to the grant of study area waiver, the Order imposed a limitation or “cap” on USF disbursements to the Accipiter study area of \$604,383 per annum. Consistent with the overarching Commission policy conclusions now established by the Memorandum Opinion and Order on Reconsideration, released September 9, 1999,² Accipiter requests that its individual USF cap be removed as of January 1, 2000.³

¹ Memorandum Opinion and Order, AAD 96-35, 11 FCC Rcd 14962 (1996) (“Order”).

² Memorandum Opinion and Order on Reconsideration, AAD 93-93, 95-72, 95-30, 97-21, 97-23, 97-117, 98-44, 98-53, DA 99-1845, released September 9, 1999 (“Cap Removal Order”).

³ Although this Request references an effective date of January 1, 2000, Accipiter does not waive its right to raise issues in the future with respect to the applicability of the Commission's policy or rules to prior periods beginning May 8, 1997.

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Accipiter expects that many other similarly-situated companies will be seeking removal of their individual USF caps consistent with the Bureau's newly articulated policy conclusions. In order to avoid the administrative burden of repeatedly applying its new policy to a multitude of almost identical requests, Accipiter respectfully suggests that the Commission simply clarify, on its own motion, its policy by lifting the 57 remaining USF caps.

In the absence of this clarification, Accipiter respectfully requests expedited action in light of the consistency of this request with the recent policy conclusions and to accommodate the completion of the USF administration prior to January 1, 2000. In support thereof, Accipiter submits the following:

I. Background

On March 11, 1996, Accipiter and US WEST Communications, Inc. filed a joint petition for waiver of the frozen study area boundaries. On November 14, 1996, the FCC released its Order authorizing the removal of 2 exchanges from US WEST's study area and the transfer of 30 access lines into a newly-created study area subject to the condition that, absent explicit approval from the Bureau, the annual USF support provided to the new study area would not exceed the estimated post-upgrade amount of \$604,383, specified in the joint petition.⁴ The National Exchange Carrier Association ("NECA") was ordered not to distribute USF payments exceeding the limitation.

⁴ Order at ¶ 13.

In the Order, the Bureau also acknowledged appropriately that

new universal service rules will alter the method used to determine the distribution of USF support to high-cost areas, thereby changing the projected level of support to ACI's study area. This, in turn, may require us to revisit these issues, and the related waiver conditions that we have established herein.⁵

Although Accipiter was aware in 1996 that the facilities to be purchased were substandard, and that the Bureau would likely impose a limit on USF recovery, Accipiter, nevertheless, fully expected that a rational network cost recovery application would be ultimately resolved consistent with the public interest.⁶ Accipiter believed that rational cost recovery would be possible by removal of the limit or the implementation of a new USF plan, under which the reasonable high costs would be addressed. Although the Accipiter study area's 2000 USF receipts, based on data forwarded from the Universal Service Administrative Corporation ("USAC") to the Commission on October 1, 1999, will likely be less than the \$604,383 cap imposed in the Order, grant of this request will allow Accipiter to proceed in coming months and years with network upgrades with the understanding that the costs incurred in providing advanced services in rural Arizona will be addressed by USF cost recovery.

II. Removal of Accipiter's Cap is Consistent with Established Commission Policy

On September 9, 1999, the Commission issued its Cap Removal Order, addressing petitions for waiver and reconsideration of the USF conditions applied to 32 study areas. While

⁵ Id.

⁶ Taking into consideration work in progress, by the end of 1999, Accipiter will have installed throughout its service area nearly 60 miles of cable; numerous Next Generation Digital Loop Carriers (NGDLC); and a full-feature Class 5 switch. Accipiter will have invested more than \$6 million in its network by the end of the 1999.

the Commission noted its policy of monitoring USF impact on carriers involved in study area changes and capping carriers at some estimate of post-upgrade costs, the Commission correctly concluded that limiting the duration of those caps is appropriate and in the public interest.⁷ Accordingly, the Commission granted petitioners' requests to lift the individual caps placed on their high cost loop support on a going-forward basis.⁸ As of January 1, 2000, the high cost loop support for the 32 study areas will then be based upon the average cost of all their lines.

The Commission acknowledged that "caps of unlimited duration may hinder petitioners' incentive and ability to extend service to previously unserved areas, as well as to upgrade service to their existing customers."⁹ The Commission also determined that "limiting the petitioners to the high cost loop support estimated in their original petitions, in perpetuity, is not necessary to accomplish the [Commission's] policies . . ." The Commission "concluded that . . . the individual caps placed on the carriers' high cost loop support have served their purpose . . ."¹⁰ The Commission also recognized correctly that lifting the caps on petitioners' high cost support will increase the affected LECs' incentives and ability to extend service to previously unserved areas and upgrade their networks."¹¹

⁷ Cap Removal Order at ¶ 9.

⁸ Cap Removal Order at ¶ 10.

⁹ Id.

¹⁰ Id.

¹¹ Cap Removal Order at ¶ 10. See also Federal-State Joint Board on Universal Service: Promoting Development and Subscribership in Unserved Areas, Including Tribal and Insular Areas, Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 99-204 (rel. Sept. 3, 1999).

Accipiter's conditions are effectively identical to those petitioners addressed in the Cap Removal Order. Therefore, removal of Accipiter's individual USF cap is both warranted by, and consistent with, the Commission's conclusions and policy enunciated in the Cap Removal Order. Like the petitioners addressed in that order, Accipiter purchased exchanges several years ago and, in conjunction with its request for study area waiver, provided a reasonable estimate of the costs to upgrade the subject facilities for the provision of basic telephone service to existing and new customers. Following the grant of study area waiver, Accipiter proceeded to deploy service and upgrade the facilities according to its plans. Continuing to limit Accipiter to the high cost loop support estimated in its original petition is not necessary to accomplish the Commission's policies. Further, continued application of the individual cap imposed in November of 1996 will hinder Accipiter's incentive to continue to invest in advanced services networks and to upgrade existing service, and would jeopardize Accipiter's ability to maintain reasonably comparable rates for modern services.

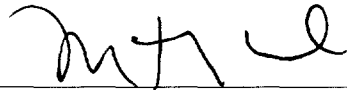
III. Conclusion

Consistent with the Commission's policy established in its Cap Removal Order, Accipiter requests that the individual USF cap established by the Commission's Order be removed as of January 1, 2000. Accordingly, Accipiter requests that the Commission lift the individual cap placed on its high cost loop support on a going-forward basis so that, as of January 1, 2000, Accipiter's high cost loop support payments will be based upon the average cost of all its lines. Adequate USF funding is necessary to allow Accipiter to continue to maintain and upgrade its facilities for the provision of universal service to its rural Arizona study area. Expedited grant of this request will serve the public interest by ensuring that Accipiter

receives adequate universal service funding to recover the costs of its investment and thereby meet its current and future service requirements.

Respectfully submitted,

Accipiter Communications, Inc.

By 

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Its Attorneys

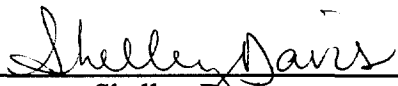
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CERTIFICATE OF SERVICE

I, Shelley Davis, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Request for Removal of Waiver Condition Consistent with Commission Policy" of Accipiter Communications, Inc. was served on this 3rd day of November, 1999 by hand delivery to the following parties:



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